

**COMPLETED ACQUISITION OF
AWAL DIGITAL LIMITED AND KOBALT NEIGHBOURING RIGHTS BY SONY
MUSIC ENTERTAINMENT**

OBSERVATIONS ON THE ISSUES STATEMENT OF 11 OCTOBER 2021

**CONFIDENTIAL
CONTAINS BUSINESS SECRETS**

25 October 2021

CLEARY GOTTlieb STEEN & HAMILTON LLP

Observations on the Issues Statement of 11 October 2021

Acquisition by Sony Music Entertainment (SME) of AWAL and Kobalt Neighbouring Rights (KNR) from Kobalt Music Group Limited (Kobalt)

This submission contains SME's Observations on the CMA's Issues Statement of 11 October 2021 (the **Statement**) concerning SME's acquisition of AWAL and KNR (together with SME, the **Parties**) (the **Transaction**). The evidence and explanations provided in this submission demonstrate clearly that the Transaction will not give rise to any significant lessening of competition (SLC).¹

I. Executive Summary

1. Far from giving rise to an SLC, the Transaction is pro-competitive. It adds complementary services to SME's roster, establishing its position in artist and DIY services and helping it compete more effectively with numerous players, including the market leader, Universal, and Warner, which both have a full suite of artist and DIY services. The Transaction will also enable [REDACTED] investment in AWAL that will benefit its artists, offering them a wider range of services, increased geographic footprint, and enhanced opportunities.
2. The Statement recognizes that the Transaction will not reduce *current* competition between SME/The Orchard and AWAL. SME agrees, as there is no meaningful competition between SME and AWAL in artist and repertoire (**A&R**) services or between The Orchard and AWAL in artist and label (**A&L**) services.
3. Instead, the Statement explains that the CMA is focusing on the loss of *potential* competition between The Orchard and AWAL in A&L services and/or between SME and AWAL in A&R services. To substantiate an adverse finding, the CMA would need compelling evidence that: (i) AWAL would have competed more closely with either SME or The Orchard (or both) in the future; (ii) the loss of future competition between AWAL and SME/The Orchard (relative to other sources of competition) would have been sufficiently significant to *substantially* lessen competition in the UK; and (iii) the loss of future competition would *substantially* harm UK consumers.
4. No such evidence exists. On the contrary, the evidence shows that no competition concerns will arise. As explained below: (i) SME has no market power with a UK share of [REDACTED]; (ii) AWAL is not a significant player, is not profitable, and does not have unique capabilities; (iii) SME and The Orchard focus on different clients from AWAL; (iv) numerous third parties will in future continue to compete closely with the Parties; (v) under the counterfactual to the Transaction – continued ownership by Kobalt – AWAL faced an uncertain future; and (vi) the Transaction will have no adverse effect on artists, DSPs, or consumers.

¹ This submission contains confidential business secrets that should not be disclosed to third parties without the prior consent of SME or AWAL as appropriate. Information confidential to SME is highlighted in yellow. Information confidential to AWAL is highlighted in blue. Information that neither party has seen is highlighted in green.

- **SME has no market power with a UK share of [REDACTED].** Since 2017, SME's UK share has fallen from [REDACTED] to [REDACTED].² It trails Universal, the global (and UK) #1, and the "undisputed market leader by a large margin."³ It faces a growing community of independent labels and service providers, whose collective share in the UK has increased [REDACTED] since 2017. SME's digital customers are tech titans that have exercised their considerable bargaining power [REDACTED]. The Statement contains no suggestion that SME exercises market power, and it is implausible that the Transaction could confer market power given AWAL's small share.
- **AWAL is not a significant player, is not profitable, and does not have unique capabilities.** [REDACTED].
 - **AWAL is a mature player whose market share remains small.** Despite operating for over 20 years, its UK share of digital distribution is only around [REDACTED] (and its global share is under [REDACTED]). With UK revenues of only around [REDACTED], it is a small player in a market that generates annual revenues >£1 billion.
 - **AWAL's UK share has [REDACTED].** Information provided by AWAL shows that its UK share of Spotify streams has [REDACTED] over the past two years and that its global share [REDACTED].⁴ AWAL's management predicts that its global share of total revenues, even with a cash injection, would be [REDACTED] by 2025. SME's internal estimates – based on substantial investment – predict a lower share – only [REDACTED] – by 2025.
 - **AWAL has never been profitable:** [REDACTED] it lacks a global footprint [REDACTED]; and it competes with numerous providers of artist services and DIY services,⁵ including Believe, Ditto, DistroKid, Downtown, and UnitedMasters, [REDACTED].⁶
 - **AWAL is not unique.** AWAL is not exceptional: it does not offer any service or proposition that other artist service companies do not also provide; [REDACTED].

² Based on 2020 IFPI UK owned and licensed shares.

³ Case COMP M.6458, *Universal Music Group/EMI Music*, paras. 372, 662.

⁴ See Appendix 8.

⁵ Annex 1 provides further information on rival UK providers of A&L services.

⁶ Believe raised €300 million in an IPO in June 2021, valuing the business at around €2 billion. DistroKid was valued at \$1.3 billion after a funding round in August 2021. UnitedMasters raised \$50 million in a March 2021 funding round led by Apple, valuing the business at c.\$350 million. Blackstone acquired Entertainment One for \$385 million in 2021.

its “gated” DIY service is not unique – other platforms have similar filtering mechanisms, which are technically straightforward to implement; and it competes in a crowded market with many companies that have better tools and are better capitalized.

In short, after more than 20 years of operations, AWAL was poised to become less relevant, rather than to disrupt the distribution of digital music or become a close competitor of SME/The Orchard.

- **SME and The Orchard focus on different clients from AWAL.** There is today no meaningful competition between SME/The Orchard and AWAL and no reason to believe they will compete more closely in the future:

- **SME and AWAL are not close competitors.** AWAL does not today exert a competitive constraint on SME and lacks the resources, capability, scale, and global footprint to become a closer competitor in the future.

- **The Orchard and AWAL are not close competitors.** The Orchard focuses on distributing labels: of its [REDACTED] clients, [REDACTED] are artists signed in the UK. By contrast, AWAL focuses on providing services to artists: [REDACTED].

- **The Orchard and AWAL had no pre-merger plans to compete more closely with each other.** [REDACTED]

[REDACTED] For its part, The Orchard set up a small artists services business a few years ago, largely to service artist clients of the labels it supports. To date, this business has signed only [REDACTED] UK artists and faces challenges growing organically.

- **Numerous third parties will in future continue to compete closely with the Parties.** There is no important dynamic of future competition between the Parties that will be lost. The distribution of recorded music has been, and continues to be, transformed by significant technological change.⁷ It is a dynamic and highly competitive market with many companies competing to sign and distribute music in the UK.

SME will continue to compete with Universal, Warner, and hundreds of independent labels to identify and sign UK artists with superstar potential. The Orchard will continue to compete intensely with >30 label services companies to provide – largely commoditized – technology-based digital distribution based on short-term contracts. And AWAL will continue to compete with dozens of

⁷ See Appendix 1 for a detailed discussion of the development of technology and DSPs.

UK artist and DIY services with comparable business models, superior technology, and better funding.

In the absence of close competition today, compelling evidence of a kind that does not exist would be required for the CMA to satisfy itself to the balance of probabilities standard that the loss of future competition between the Parties would be sufficiently significant to substantially lessen competition in the UK and substantially harm UK consumers.

- **Under the counterfactual to the Transaction – continued ownership by Kobalt – AWAL faced an uncertain future.** [REDACTED]

[REDACTED]

[REDACTED]

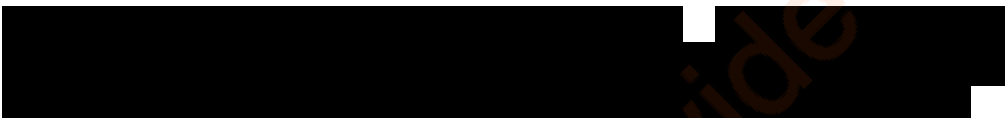
⁸ Based on this evidence, which is highly relevant to the assessment of AWAL's future prospects, it is inconceivable that, under Kobalt's ownership, AWAL could (still less would) have expanded into new markets, grown its current share, and/or become a closer competitor of SME in A&R services or The Orchard in A&L services.

- **The Transaction will have no adverse effect on artists, DSPs, or consumers.** Given the structure and dynamics of the market, the Transaction will not have any adverse effect on artists, DSPs, or consumers.
 - **Artists and labels** have and will continue to have multiple choices. SME, The Orchard and AWAL will continue to focus on their respective areas of service – SME on potential superstars, The Orchard on labels, and AWAL on mid-tier and emerging artists. SME's rivals, which together account for [REDACTED] of the UK market, will continue to have the ability and incentive to compete intensely.
 - **DSPs** will be unaffected. [REDACTED] its global share of digital distribution [REDACTED] is low; and none of its artists, which are on short-term contracts, are capable of strengthening SME's pre-existing negotiating position.
 - **Consumers** will not be affected by the Transaction. The Statement suggests that the CMA is considering only the impact of the Transaction on artists and labels (Statement, paragraph 35). It must also consider the impact on consumers who will continue to benefit from access to a greater choice of music at lower prices than ever.

⁸ See too Appendix 9.

5. This Transaction is the polar opposite of the type of potential competition cases that have raised concerns in the past – where a dominant company has anti-competitively acquired a nascent target that is particularly well-placed to disrupt an industry because there are no or few credible non-merger rivals. Specifically:

- The Parties together accounted for only 20-25% of 2020 digital sales of recorded music in the UK.
- The Parties’ activities and capabilities are different and complementary. As a result, there is virtually no current competition between them.
- SME, The Orchard, and AWAL face, and will continue to face, dozens of rivals in each of their respective areas of focus.

- 

6. Given the underlying facts, compelling evidence would be needed to establish an SLC.⁹ None exists. To the contrary, the evidence consistently shows that there is no meaningful current competition between the Parties, no likelihood of material future competition, and no prospect of the Transaction giving rise to an SLC and harm to UK consumers:

- Industry experts, including Enders Analysis, whose opinion is provided in **Appendix 1**, and third-party commentators cited in **Appendix 2**, recognise that technology has given artists and labels more choice than ever before.
- Empirical data, including switching and win/loss data prepared by RBB Economics at **Appendix 3**, show very limited overlap between the Parties in label distribution and confirm that The Orchard’s closest rivals are Believe, INgrooves, ADA, OneRPM, and PIAS.
- Economic analysis, including an analysis at **Appendix 4** prepared by RBB Economics, highlights significant differentiation between the customers served by AWAL and SME, and the customers served by AWAL and The Orchard.
- Review of the Parties’ internal documents at **Appendices 5 and 6** shows that, contrary to the finding in the Phase 1 Decision, SME/The Orchard’s documents do not mention AWAL “*most frequently and, typically, most prominently*” and AWAL’s documents do not focus to any great extent on The Orchard or SME:

⁹ The CMA’s findings must be “*securely rooted in the evidence*”; the CMA cannot “*leap to any conclusion*” without “*robust evidence*”. Absent robust evidence, it is insufficient for the CMA simply to record its “*belief*” that certain effects will be produced, or to engage in “*speculation*” as to such effects. See *JD Sports Fashion Plc v. CMA* [2020] CAT 24, paras. 31, 131, 141, 142, 152, 154; and *Tesco Plc v CC* [2009] CAT 6, para. 150. See also, by analogy, *re H (Minors)* [1996] AC 563, p.586 (“*The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established*”).

- **SME/The Orchard.** AWAL is mentioned *less* frequently in SME's documents than many rivals, including Universal, Warner, ADA, Believe, BMG, Caroline/Virgin, PIAS/Integral, Downtown, IDOL, and SoundCloud. SME/The Orchard's documents show that SME viewed AWAL as one of many rivals.

 - **AWAL.** [REDACTED]
- Testimony and other evidence, including that provided in **Appendix 7**, explaining that SME did not adapt its deal terms for artists in response to competition from AWAL.

 - [REDACTED]

 - Testimony and other evidence, including that provided in **Appendix 11**, explaining that SME's investments in The Orchard have intensified competition and benefitted artists signed to independent labels.

 - Empirical data, including that prepared by RBB Economics at **Appendix 12**, showing that the Transaction will have no effect on DSPs.
7. In short, the overwhelming body of available evidence demonstrates that the Transaction is pro-competitive and will not give rise to any SLC. The remainder of this submission is structured as follows. **Section II** explains that competition in recorded music occurs at two distinct levels. **Section III** shows that SME and AWAL are not actual close competitors. **Section IV** explains that SME and AWAL are not potential close competitors. **Section V** explains that the Parties will continue to face strong competition from many credible rivals. **Section VI** explains that the Parties' documents do not position SME/The Orchard and AWAL as close competitors. **Section VII** explains that the Transaction will benefit AWAL's artists. **Section VIII** explains that the Transaction will have no effect on DSPs. **Section IX** concludes.

II. Competition Occurs At Two Levels – To Sign Artists/Labels And To Distribute Music

8. Competition in recorded music occurs at two levels: to sign artists; and to distribute content to DSPs (and, to a lesser extent, physical retailers). Many companies compete at both levels, although some (including, in particular, providers of services to independent labels) are active only (or primarily) in the distribution of recorded music. Artists today have more ways than ever to get their music to consumers. As Enders Analysis explains, “*the opportunities for artists and labels to exploit their works have been transformed by the massive consumer shift to DSPs*”.¹¹
9. The International Federation of the Phonographic Industry (“**IFPI**”) calculates market shares on two bases: for “owned and licensed share”; and for “distributed share”. The former is a proxy for competition to sign artists because revenues are allocated to the label that has signed a particular artist. The latter is a proxy for competition to distribute music to DSPs because it includes revenues from owned and licensed music, as well as music distributed on behalf of an independent label service provider (*i.e.*, distribution deals).
10. Competition for artists principally takes place at the national level. Artists typically seek to ensure that their music has as wide an audience as possible, but tend to sign with a label or service provider in the country where they are located.¹² By contrast, distribution to DSPs is global, as DSPs operate on a global basis and negotiate deals on a multi-territory or global basis. By way of example, music distributed to Spotify is available to stream in any country where Spotify is active and is generally based on terms negotiated on a worldwide basis.
11. The table below sets out the Parties’ 2020 shares (as determined by IFPI) of UK owned and licensed content and global distribution:

¹¹ See **Appendix 1**. See too Goldman Sachs Industry Report, 26 April 2021 (“*The global expansion of streaming platforms and social media/online video channels has played a key role in democratizing music, significantly lowering the cost of music production, distribution and discovery. This has led to an exponential growth in the number of artists [...] this trend has also given greater power to artists who are increasingly seeking greater control of their careers and copyrights leading to the proliferation of a la carte label and artist services*”).

¹² Case COMP/M.6458 Universal Music Group / EMI Music, Commission decision of 21 September 2012, para 100 (“*A&R services are provided to different market players (artists) and entail a different organisation within record companies compared to the downstream wholesale activities. There are also certain competitive dynamics, which are specific to A&R*”).

IFPI Market Shares

	SME (excluding The Orchard)	The Orchard	AWAL
UK Revenues (2020) £ million	■	■	■
UK Owned & Licensed Share	■	■ ¹³	■
Global Distribution Share	■	■	■

III. SME and AWAL Are Not Close Competitors

12. The Statement explains that, in assessing whether the Transaction may reduce potential competition, the CMA will investigate the current closeness of competition between the Parties (Statement, para. 39d), together with the current overlap and differences in the Parties' activities and capabilities (Statement, para. 39c). SME agrees that these enquires are important. After all, if there is today no material competition between companies that have operated alongside each other for 20 years, the possibility that they might in future become closer competitors to a point where the overall competitiveness of the market is significantly reduced is extremely speculative. Compelling evidence of a major future change from past performance would be needed for this hypothesis to be credible. As explained elsewhere, there is no such evidence.
13. There is today no material competition between the Parties: they have different offerings, different capabilities, and focus on different types of clients. The lack of competitive interaction is confirmed by the absence of customer switching between the Parties. As described further below, there has been virtually no incidence of any artist switching between SME or The Orchard and AWAL. The lack of competition is also confirmed by industry experts. In these circumstances, the possibility that SME's acquisition of AWAL would reduce future competition is extremely unlikely.

A. SME And AWAL Do Not Compete In A&R Services

14. Although the Issues Letter had claimed that SME and AWAL might compete in A&R services for top artists, the Phase 1 Decision did not pursue this contention.¹⁴ The Statement, likewise, does not appear to suggest that SME and AWAL compete in A&R services for top artists.
15. This is not surprising. AWAL lacks the capability and global scale to compete in A&R services. It provides a lighter level of services, does not offer the breadth or depth of service in music creation and/or marketing and promotion, does not fund artist services (■■■■■), does not engage in ■■■■■, and does not and cannot offer ■■■■■ that SME can offer "superstar" performers. To put this into context, AWAL's top 20 artists each generated

¹³ Based on 2020 revenues from artists signed to The Orchard in the UK.

¹⁴ The Phase 1 decision contends that AWAL's main focus for expansion was in relation to mid-tier artists (Phase 1 Decision, para. 139).

worldwide revenues averaging [REDACTED] in 2020 and just under [REDACTED] if [REDACTED] AWAL's most successful artist, is excluded. By contrast, SME's top 20 artists each generated worldwide revenues averaging over [REDACTED] in 2020.¹⁵

16. AWAL does not attract (or retain) the same profile of artists as SME's frontline labels, and is not positioned to do so in the future. AWAL's business is geared towards servicing artists that do not require – or necessarily want – the same level of service as SME's frontline artists. This is reflected in the core differences between AWAL and SME's frontline labels, which are summarized in the following table.

Differences Between A&L Service Providers and Frontline Labels

Function	A&L Service Provider	Frontline Labels¹⁶
Type of artist	New artists / heritage / local acts	Global/regional/local superstars
Deal type	Artist retains rights, single project deals	Labels obtain rights in perpetuity/ for a period, long term license deals
Advances	Smaller and typically only for certain artists to fund business costs (which is fully recoupable)	Larger, personal advances routinely offered to artists, only recoupable from artists' royalty share
Service level	Low-touch, untailed, small scale and at artists' direction	High-touch, individualised, large-scale, global
Service range	Narrower standard range of services (at artists' discretion)	Broader range of services, determined by label
Source of funding	Artists pay for services	Labels fund services

17. The fact that AWAL does not compete with SME in A&R services is evident from switching data, the CMA's Phase 1 survey, and SME's internal documents.
- SME has identified no artist who has moved from SME to AWAL, and only one artist who was recently courted by SME but decided to sign with AWAL.¹⁷
 - In response to the CMA's Phase 1 request to list AWAL's closest alternatives, AWAL's customers did not identify SME's frontline labels as one of their top three competitors.

¹⁵ See SME's response to question 5 of RFI 10 of 10 August 2021.

¹⁶ [REDACTED]
Accordingly, there may be exceptions to the level of service provided to frontline artists.

¹⁷ [REDACTED]

- SME's internal documents do not identify AWAL as a competitor in A&R services.¹⁸
18. The absence of current or historic competition between AWAL and SME is confirmed by [REDACTED], a highly experienced SME UK executive who has negotiated with UK artists for more than 15 years. [REDACTED]
19. As to the future, the Statement indicates that the CMA is assessing whether AWAL has the “*potential for greater future competitive impact*” (Statement, para. 39(e)). As explained further below, the evidence clearly shows that AWAL was struggling to maintain its existing position and that, under Kobalt's continued ownership, it would not be in a position to expand its activities to compete with SME.

- First, [REDACTED]
- Second, [REDACTED] finding songs and collaborators, management and direction of the recording process, production of artwork and photography, design and execution of global social media, promotion and marketing campaigns, tours, and other support.²⁰
- Third, [REDACTED]²¹ Consequently, as and when AWAL artists achieve widespread success, they typically move to a record label where they can be better supported as their needs develop.²²

¹⁸ AWAL is not positioned as a competitor to SME's frontline labels. Rather, AWAL is described as being a complement to SME's existing offerings. [REDACTED]

¹⁹ Phase 1 Decision, para. 168.

²⁰ Promoting and marketing music globally requires a local knowledge and expertise in each country, which SME has built up over decades.

²¹ [REDACTED]

²² By way of example, [REDACTED] recently left AWAL to release a new album with Universal's frontline label Interscope.

20. In these circumstances, there is no basis for maintaining that AWAL could in the foreseeable future become a meaningful competitor of SME in signing and distributing frontline artists.

B. SME And The Orchard Do Not Compete With AWAL To Any Material Extent In A&L Services

21. Although the Orchard and AWAL both provide A&L services, they have fundamentally different focuses, as a result of which they do not compete with each other in any meaningful way:²³

- **The Orchard focuses on *label distribution*:** The Orchard focuses on providing distribution services for independent labels. This service consists primarily of distributing recorded music to DSPs, with less marketing and promotional support than artist services (limited to executing label clients' strategies for their artists). Out of The Orchard's [REDACTED] distribution clients, only [REDACTED] of them are UK signed artists ([REDACTED]). The Orchard offers no DIY platform for mid-tier and emerging artists.
- **AWAL focuses on *artist services*:** AWAL, on the other hand, focuses on providing services to its c. [REDACTED] independent artists: [REDACTED] of its clients are independent artists. It provides these services via their low-cost gated DIY platform (AWAL Core) and fuller artist service offerings (AWAL+ and AWAL Recordings).²⁴ Having tried to focus initially on winning both label and artist clients, AWAL realized [REDACTED]

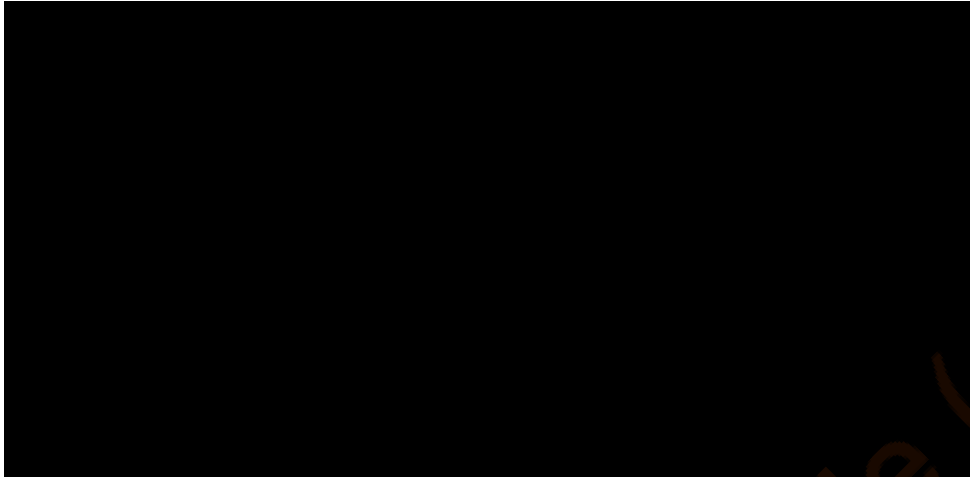
25

²³ See **Appendix 1** for an explanation of the distinction between artist and label services.

²⁴ AWALCore offers a low-cost "gated" DIY platform to c. [REDACTED] independent artists at the beginning of their careers. AWAL+ and AWAL Recordings, in turn, offer a set of artist services (including project funding, artist support, marketing, and synch and playlist promotion) to around [REDACTED] "on the verge" artists and around [REDACTED] more established artists.

²⁵

The Orchard Focuses On Labels, While AWAL Focuses On Artists



22. AWAL's and The Orchard's different focus reflects the differences between label and artist services.
- First, artist services are more labour-intensive and require greater overheads per unit of sales: each artist needs a hands-on approach, whereas label clients handle their artists themselves.
 - Second, artists and labels require different expertise. A label service would need to build a new team and relationship network to attract and provide a high quality service to artists. The converse is also true: artist services companies would have to build a team and network to attract a label client base.
 - Third, artists and labels require different capabilities.²⁶ Labels require a more technology-intensive service with distinct tools to monitor and manage a stable of artists. They typically also want a distributor to provide physical and digital distribution, which requires a distinct supply chain and distribution network.
 - Fourth, branding and reputation are important in attracting artists and labels. It would take time for a player like The Orchard, which has traditionally been seen as a label distribution service, to develop a record of success as an artist service provider and become known as a viable option for artists.
23. Their different focus is also confirmed by industry experts. Enders Analysis explains that "*The Orchard and AWAL do not compete for clients*" and that "*the scope of services provided by The Orchard to labels is distinct from those provided by AWAL to its artists*".²⁷ Likewise, a series of recently published articles at **Appendix 2** describe the various options available to mid-tier and emerging artists, listing over 20 artist and DIY services as viable options for artists. The Orchard is not listed as an alternative in any of these articles. Similarly, a report by Ari Herstand, who Forbes considers to be "*the poster*

²⁶ See **Appendix 1** ("*By focusing its operations on labels, which typically represent numerous artists, The Orchard achieves a much higher scale of operation than AWAL, and provides a distinct set of services to the clientele consisting of labels*").

²⁷ See **Appendix 1**.

*child of DIY music,”*²⁸ excluded The Orchard from consideration because it “*primarily work[s] with labels.*”²⁹ None of these articles identifies The Orchard as one of the “top” alternatives for artists (in one case, not even in the top 20).³⁰

24. Finally in this connection, **Appendix 4** contains an analysis conducted by RBB Economics of the Parties’ respective customers, which confirms the existence of “*significant differentiation between AWAL and SME, and between AWAL and The Orchard, supporting the notion of differing focus areas.*” [REDACTED]

[REDACTED] SME artists would not consider AWAL a credible alternative to labels that are geared to support larger artists with global followings.

25. **SME’s internal documents confirm the absence of competition.** AWAL’s and The Orchard’s different activities are confirmed by an analysis of SME’s internal documents at **Appendix 5**. Likewise, SME’s internal documents discussing the Transaction’s rationale describe the complementarity of The Orchard’s and AWAL’s businesses. [REDACTED]

[REDACTED] ”³¹

[REDACTED] ”³²

26. **AWAL’s internal documents confirm the absence of competition.** [REDACTED]

27. **Switching data confirm the absence of competition.** The Statement notes that it will consider “*evidence of customer switching*” in assessing the competition between the parties (Statement, para. 39d). The Parties’ switching data confirm that The Orchard and AWAL do not compete. [REDACTED]

[REDACTED] Because contracts with A&L service providers are typically short-term, were The Orchard and AWAL close competitors, one would expect to observe material switching between them.

²⁸ See Forbes, Meet The Poster Child of DIY Music, March 31, 2017, available at: <https://www.forbes.com/sites/dannyross1/2017/03/31/meet-mr-diy-ari-herstand/>.

²⁹ See **Appendix 2**.

³⁰ See **Appendix 2**.

³¹ PROJECT OVERDRIVE - Approval, October 2020, annex 1.6.1 to Sony’s response to the s.109 Notice of 16 September 2021, slide 6.

³² [REDACTED]

[REDACTED] ”

28. **Win/loss data confirm the absence of competition.** The Phase 1 Decision acknowledged that the data “*clearly suggests limited switching*” (Phase 1 Decision, para. 70). It observed, however, that the data relate only to existing customers and not competition for new clients. To address that observation, RBB Economics have conducted a fresh analysis, provided at **Appendix 3**, which examines the Parties’ win / loss data for new or existing labels. This analysis confirms the conclusion of the original switching data analysis: of more than [REDACTED] instances, the data show only [REDACTED] cases in which a label negotiated with both Parties.

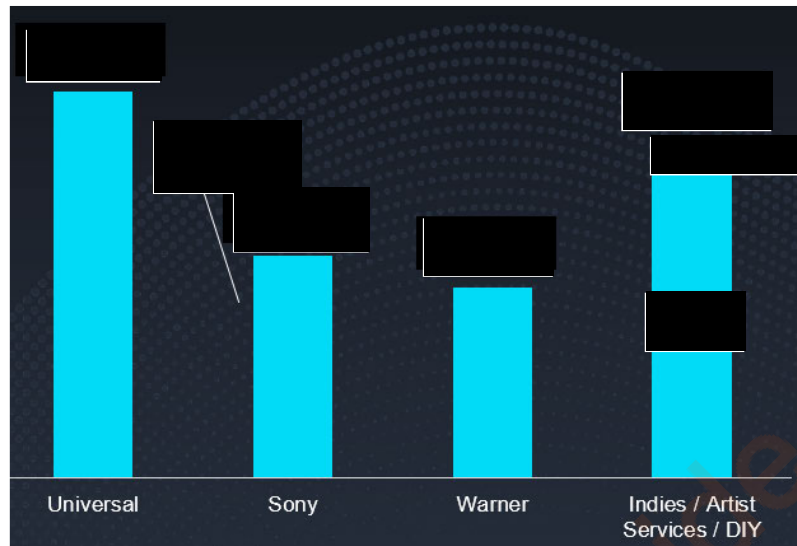
Win / Loss Data Show Minimal Competition Between The Parties To Win Labels



29. **AWAL’s shares confirm it is a small player.** Market share data confirm that AWAL is not a close competitor. IFPI 2020 data show that AWAL’s UK share (excluding label distribution) was [REDACTED].³³ Accordingly, the Parties’ combined share of owned and licensed music will be around [REDACTED]. For completeness, IFPI calculates SME’s owned and licensed share as [REDACTED] in the UK [REDACTED]

³³ These shares exclude UK revenue attributed to distribution deals with independent labels. This reflects the fact that SME has no control over the artists underlying The Orchard’s label services deals (the artists are signed to other labels). They are based on IFPI data.

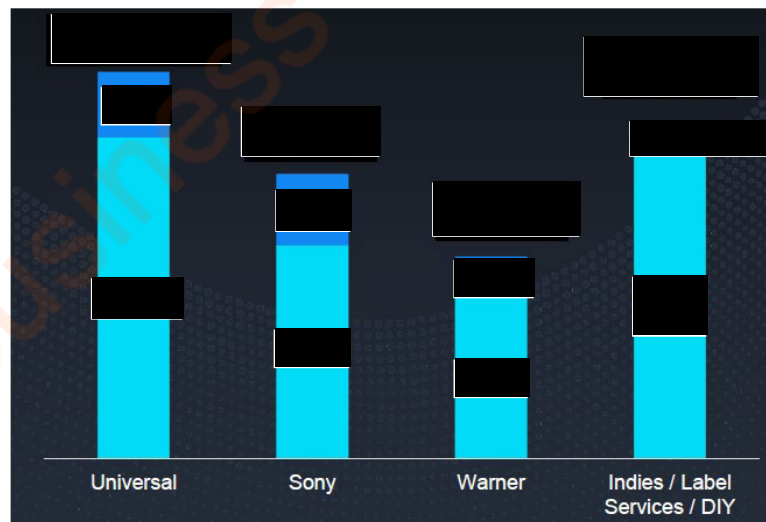
Shares of owned and licensed digital music, UK, 2020



Slide 26, SonySite Visitdeck, 15 October 2021

30. The Parties' combined global share of digital distribution (which includes distribution of independent labels, including through The Orchard) is around ██████████ with a negligible increment of only ██████████. ██████████. Accordingly, the assertions made in the Phase I decision concerning AWAL's historic growth relative to other A&L service providers does not provide a reliable guide to AWAL's future prospects.

Market shares of digital music distribution, Global, 2020

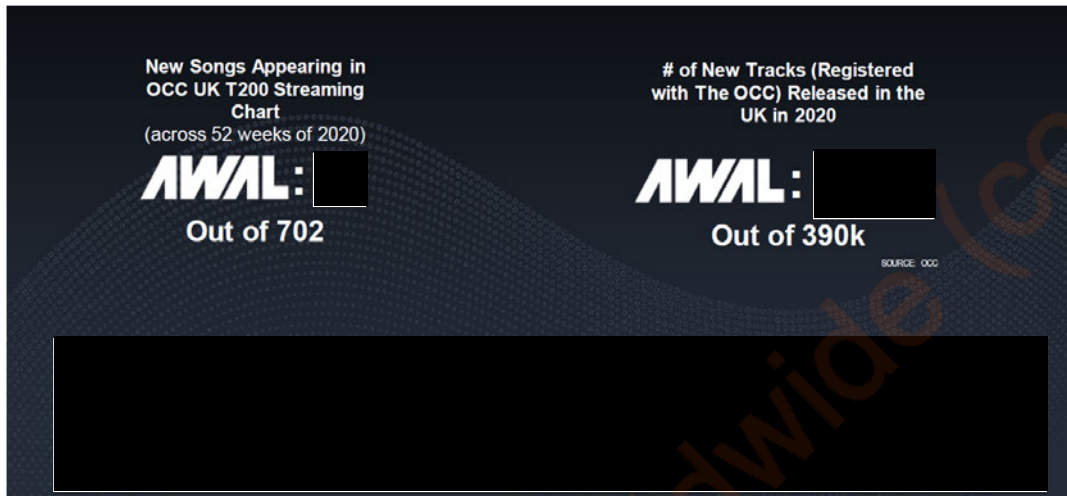


Slide 18, SonySite Visitdeck, October 2021

31. **Streaming shares confirm no impact on competition:** The Statement explains that the CMA intends to concentrate its assessment on streaming (Statement, para. 45). The lack of any meaningful impact on competition is also confirmed by streaming share data:

- AWAL accounts for ██████████ of songs uploaded annually to Spotify, the leading digital streaming platform.

- SME and AWAL together account for [REDACTED] of tracks delivered to Spotify globally.
- AWAL accounts for [REDACTED] of new songs appearing in the UK T200 streaming chart.



Slide 7, Sony Issues Meeting deck, 4 August 2021

32. In short, SME (and The Orchard) and AWAL do not compete closely with each other. This is important not only because it shows that the Transaction cannot restrict current competition, but it also provides a baseline for assessing potential competition theories. Because there is no rivalry today, compelling evidence would need to exist that the Parties would compete closely in the future before there could be even the possibility of an SLC. But, as discussed below, there is no such evidence here.

IV. SME And AWAL Are Not Potential Close Competitors

33. The Statement explains that to assess whether the Transaction could give rise to a loss of potential competition, the CMA will examine “*how AWAL has achieved growth (above market growth)*” (Statement, para. 39a) and whether, absent the Transaction, “*AWAL would have expanded in size and in the range of activities it undertakes*” (Statement, para. 39f(ii)). It also states that the CMA will consider whether “*SME would have expanded the activities of The Orchard*” absent the Transaction (Statement, para. 39f(i)). SME agrees that these questions are relevant to an assessment of a potential competition theory of harm. A review of the evidence, however, indicates that there is no possibility of an SLC based on such a theory.

A. There Is Nothing Distinctive About AWAL Suggesting That, Absent The Transaction, It Would Have Become A Significant Competitor

34. In past cases involving potential competition theories, the CMA established that the loss of potential competition was significant based on objective factors. This could be because the target was developing new technology as in *Sabre / Farelogix*,³⁴ because the

³⁴ *Sabre / Farelogix*, ME/6806/19, CMA Final Report 9 April 2020, para. 11.101-11.102. In *Sabre / Farelogix*, the Farelogix had developed technology for airlines to offer tickets to passengers. Sabre was

target had an innovative business proposition as in *Experian / ClearScore*,³⁵ or because the target was a “*disruptive force*” in a highly concentrated market where the acquirer had a 90% share as in *Illumina / PacBio*.³⁶

35. No such facts exist in the present case. AWAL is one of many artist and DIY services providers. In the 20 years since its launch, it has developed a brand name, attracted artists, and has a strong leadership team. It is not, however, exceptional. [REDACTED]
[REDACTED] ”³⁷ and competes in a crowded field. Since its inception, its global share has never exceeded [REDACTED] and is today below [REDACTED]. Notwithstanding its initial success and growth (from a very low base), any “first mover advantage” was short-lived [REDACTED].
36. Others have replicated and improved on AWAL’s offering using readily available tools. As recognised by Enders Analysis, many competitors have built better tools than AWAL³⁸ contrary to the Phase 1 Decision’s contention that “*AWAL has more capabilities compared with those offered by most other A&L service providers.*”³⁹ [REDACTED]
[REDACTED]
37. Third party industry commentary highlights the wide range of different options available to artists.⁴⁰

in the process of developing a similar technology. The CMA found that the merger would reduce Sabre’s incentives to independently develop new merchandising software. Absent the merger, Sabre would become one of three most significant competitors in merchandising.

³⁵ *Experian / Credit Laser Holdings (ClearScore)* ME/6743/18, CMA Provisional Findings Report 4 December 2018, para. 11.66-11.70. In *Experian / ClearScore*, Experian was the leading provider of a paid for credit checking tool. The introduction of an innovative free credit checking tools by ClearScore had disrupted Experian’s business model, leading it to release its own free credit checking tool. The CMA provisionally found that the acquisition of ClearScore, the leading provider of free credit checking tools, would reduce both parties’ incentives to invest in improvements in their credit checking tools.

³⁶ *Illumina / PacBio*, ME/6795/18, CMA Provisional Findings Report 24 October 2019, para. 8.289. In *Illumina / PacBio*, PacBio had recently developed a new, innovative DNA sequencing technology. The CMA provisionally found that PacBio’s improvements to its technology incentivised Illumina to improve, and that this “*race for innovation*” would intensify absent the merger. Taken together with the parties’ high combined market share (90-100%), the CMA found that the merger would result in the combination of two of only a small number of options in a highly concentrated market.

³⁷ See **Appendix 7**, pp.3-4.

³⁸ See **Appendix 1**.

³⁹ Phase 1 Decision, para. 144(d).

⁴⁰ See **Appendix 2**.

- Millennial Mind recognises that there are “over twenty different digital distribution platforms that appeal to independent musicians.”⁴¹
- Two Story Melody observes how “[r]ecord labels were once your ticket into the music industry...It’s 2020 and now it’s easier than ever to get your music out there.”⁴²
- Ari Herstand describes how “[t]here is no ‘best music distribution company’ necessarily because each company has unique features that may be super important to some artists and not at all to others.”⁴³
- Sundown Sessions recounts how “[t]hankfully, there are plenty of options out there when it comes to digital music distribution [...] there are a ton of digital music distribution companies out there in 2020. Each one has its own features that set it apart from others on this list. So, you can’t really rank any one distributor better than the rest.”⁴⁴
- Music Distribution Guru recounts how “every distribution company is different and is aimed at meeting the diverse and ever-changing needs of artists. The music distribution company that will work best for you depends on your unique goals, resources, and identity as an artist [...] Every music distribution company comes with its unique strengths and weaknesses.”⁴⁵

38.

[REDACTED] ⁴⁶ [REDACTED]
[REDACTED] :

- [REDACTED] : [REDACTED] [REDACTED] [REDACTED]
[REDACTED] AWAL’s annual growth was [REDACTED] in the financial year 2018/19; [REDACTED]
in financial year 2019/20; and [REDACTED] in the financial year 2020/21.⁴⁷
- [REDACTED] : Information provided by AWAL shows that its UK share of Spotify streams has [REDACTED] over the past two years and that its global share has [REDACTED]⁴⁸ Far from seeing above-market growth, as the Phase 1 Decision suggested at para. 127a, AWAL’s share has [REDACTED] [REDACTED]

⁴¹ [Top 20 Digital Distribution Platforms for Indie Artists 2021](#) by Millennial Mind.

⁴² [Top 8 Music Distribution Services for Indie Artists](#) by Two Story Melody.

⁴³ [Best Music Distribution Companies](#) by Ari Herstand.

⁴⁴ [8 of The Best Digital Music Distribution Companies \(2020\)](#) by Sundown Sessions.

⁴⁵ [The Best Music Distribution Companies in 2021](#) by Music Distribution Guru.

⁴⁶ [REDACTED]

⁴⁷ As explained in **Appendix 10**, SME considered AWAL’s scalability and growth to be contingent on SME investment.

⁴⁸ See AWAL Site Visit deck, slide 17.

- **Low share projection by 2025:** AWAL’s management produced market projections during the sale process on the favourable basis that AWAL would receive substantial financial investment to allow it to grow. Even these optimistic projections give AWAL a global share of only [REDACTED] by 2025. SME’s valuation model, which took account of substantial planned investment, revised projections down to [REDACTED], contrary to the Phase 1 Decision’s finding that SME’s model assumed AWAL would “continue to grow significantly” (Phase 1 Decision, paragraph 136). Accordingly, even at the edges of the CMA’s reasonable time horizon for the assessment of potential competition, AWAL and SME both expect AWAL to remain an insignificant player.⁴⁹

SME predicts a global share of [REDACTED] by 2025



Revenue assumes SME projections. Digital market projections from Goldman Sachs

- **Growth relates to DIY services, where SME (and The Orchard) are not present:** The majority of AWAL’s UK revenue growth ([REDACTED]) in each of the past four years comes from its DIY platform (and other minor revenue streams) rather than its artist services offerings. Neither The Orchard nor any other SME division have DIY services. Accordingly, most of AWAL’s growth comes from a product that SME and The Orchard do not offer.

- [REDACTED] 50
Maintaining AWAL’s growth would have been particularly challenging [REDACTED]

⁴⁹ Although the CMA’s Merger Assessment Guidelines does not specify a timeframe in which potential entry or expansion must occur for the purposes of the counterfactual or potential competition (para. 3.15), the CMA’s default time frame has typically been two years (see Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, p. xiv).

⁵⁰ [REDACTED]

[REDACTED]
51

- **No global footprint and [REDACTED]**. AWAL’s team stands at only [REDACTED] employees, with a limited geographic spread mainly in the US and UK.

[REDACTED]
52

- **No unique business model.** The Statement indicates that the CMA will consider whether “*AWAL’s model is seen as disruptive*” (Statement, para. 40a). The reality is that AWAL’s artist-focused service is comparable to, and is little different from, those offered by many providers.⁵³ Although it was among the first companies to provide artist and DIY services to mid-tier and emerging artists, its services have been replicated by dozens of others.⁵⁴
- **AWAL does not have unique or exceptional technology, IP, or assets.** Likewise, its “gated” DIY service is not unique: other platforms have similar filtering mechanisms, which are technically straightforward to implement.

[REDACTED]
AWAL offers comparable services (e.g., DIY service and a fuller suite) to multiple rivals including Amuse,⁵⁵ Believe,⁵⁶ Ditto,⁵⁷ Downton,⁵⁸

⁵¹ See, e.g., ‘Would AWAL Really Have Thrived Had it Not been Sold to Sony Music?’, Tim Ingham, Music Business Worldwide: “*Simple: If Kobalt owed \$185 million plus interest for a loan, didn’t have the cash to cover it, and had net liabilities of over \$110 million [...] it becomes much, much harder to argue that AWAL had a bright future ahead of it before Sony Music snapped it up this spring.*” See too **Appendices 8 and 9.**

⁵²

⁵³ Commentary by Sundown Sessions identifies that “*Although, [distributors] all achieve more or less the same end result, their features and pricing schemes can vary greatly.*” See **Appendix 2.**

⁵⁴ See too **Appendices 1, 6, and 7.**

⁵⁵ Amuse provides: (i) a DIY distribution service, (ii) a ‘pro’ subscription tier with added benefits, and (iii) an in-house record label providing a broader range of services.

⁵⁶ Believe combines its core A&L services business with TuneCore’s DIY platform. TuneCore has upstreamed 340 artists to Believe’s A&L services divisions as part of Believe’s ‘Signed By’ programme for emerging artists.

⁵⁷ Ditto offers: (i) DIY distribution, (ii) a ‘pro’ subscription tier via its Ditto Plus division, and (iii) a management and publishing tier.

⁵⁸ Downton combines its own A&L services division (Downtown Music Services) with CD Baby’s DIY platform and A&L solutions (including a ‘pro’ tier that also incorporates publishing administration services), FUGA’s distribution and marketing platform, and Songspace’s rights management offering.

OneRPM,⁵⁹ SoundCloud,⁶⁰ Universal,⁶¹ and Warner,⁶² as the following diagram shows:

	AWAL	believe.	DOWNTOWN	PIAS	amuse	DI++O	oneRPM	III
LABEL DISTRIBUTION	AWAL	Believe	FUGA	Integral			OneRPM	
LABELS		Naive Nuclear Blast		PIAS Label Group	Amuse Label		Next Level	Next Up
ARTIST SERVICES	AWAL Recordings	Believe	Downtown Music Services	Integral	Amuse Pro	Ditto	Taking Off	United Masters
DIY	AWAL Basic	Tunecore	CD Baby		Start Boost	Ditto Music	DIY	Select

Slide 18, SonySite Visit deck, 15 October 2021

- **SME’s valuation reflects AWAL’s [REDACTED] prospects:** AWAL’s valuation was below recent implied valuations of other A&L businesses and DIY services, including UnitedMasters, DistroKid, and Believe. This is contrary to the Phase 1 Decision’s finding that the “value of [...] ungated DIY platforms appears to be materially lower than the price that Sony has paid [...] to acquire AWAL” (Phase 1 Decision, paragraph 214). In **Appendices 9 and 10**, Allen & Company and SME explain that the Transaction value was reasonable given AWAL’s [REDACTED] financial position and comparable industry benchmarks.

39. In short, there is nothing distinctive about AWAL. As Enders Analysis explains:

“AWAL competes with numerous comparable providers – including those with newer and superior technology. [REDACTED]”

“There is no reason to believe that AWAL is well-placed to outcompete the numerous other artists services and DIY services providers.”⁶³

40. Based on AWAL’s past performance and current trends, its market position was declining. Against this background, it is inconceivable that AWAL could [REDACTED] and thereby developed into a significant competitor of The Orchard and/or SME in the future. SME acquired AWAL because it offers

⁵⁹ OneRPM offers three levels of service: (i) a DIY platform, and (ii) two fuller-service options called ‘Taking Off’ and ‘Next Level’ that provide artists with more resources.

⁶⁰ SoundCloud offers DIY distribution through SoundCloud Premier and artist services through its Repost division.

⁶¹ Universal owns Virgin Music Label and Artist Services (label services and distribution), INgrooves (artist services) and Spinnup (DIY). Spinnup has upstreamed over 80 artists to Universal labels.

⁶² Warner owns ADA (A&L services) and LevelMusic (DIY).

⁶³ See **Appendix 1**.

complementary services to SME/The Orchard, has a known brand and strong leadership team, and, importantly, because it was available for purchase at a reasonable price.

B. SME Does Not Have Market Power

41. Harm from the loss of potential competition may be more likely to arise where the acquirer already holds significant market power.⁶⁴ Here, rightly, the Issues Statement does not suggest that SME holds any degree of market power.⁶⁵ Nor could it:

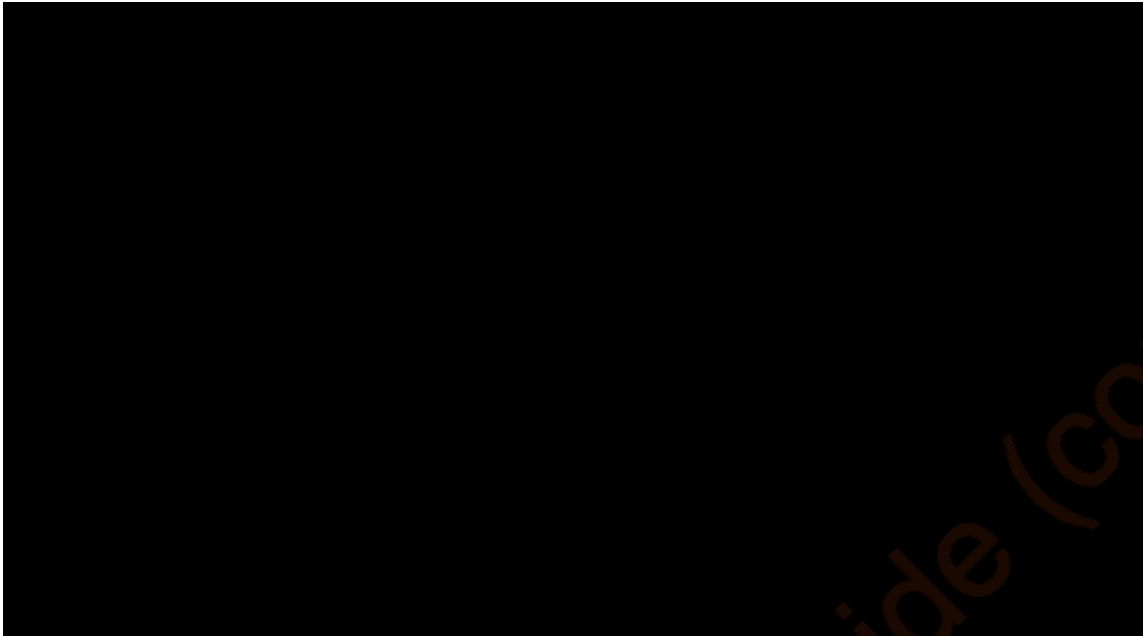
- **SME trails the market leader:** SME is the #2 player and has a modest UK share of only [REDACTED] ([REDACTED] including distribution deals), which is below any cognizable measure of market power. It trails Universal, “*the undisputed market leader by a large margin.*”⁶⁶
- **SME’s downstream DSP customers are tech giants:** DSPs are unavoidable trading partners: Spotify, Apple, and Amazon account for c. [REDACTED] of SME’s UK revenues. [REDACTED] SME is reliant on DSPs because they control the relationship with consumers. Each DSP has its own user base, which means that SME has to license to all of them in order to provide artists with the expected level of service and maximize consumption of their music.
- **SME improves terms for artists:** SME faces intense pressure from artists to improve deal terms.⁶⁷ Over the course of 2015 to 2020, SME’s artist costs have [REDACTED] of gross revenues in 2015 to [REDACTED] in 2020. The proportion of traditional royalty deals – where SME keeps the rights to recorded music in perpetuity – has [REDACTED] in 2016 to [REDACTED] in 2020. Deal exploitation periods have [REDACTED] years in 2017 to [REDACTED] years in 2020 (for new deals signed in that year). And SME has introduced a range of initiatives to offer ever-more value to artists, as illustrated in SME’s internal documents:

⁶⁴ Merger Assessment Guidelines, para. 5.15 (“*The impact of a potential entrant on competition is likely to be more significant when there are fewer strong existing competitive constraints on the other merger firm; where the other merger firm would already have market power (with greater market power being associated with a greater likelihood of an entrant having a bigger impact on competition)*”). For example, in *Illumina / PacBio*, ME/6795/18, CMA Provisional Findings Report 24 October 2019, para. 8.120, Illumina had a 90% share.

⁶⁵ The Issues Letter maintained that SME held market power. No such allegation appears in the Phase 1 Decision or the Issues Statement. The Phase 1 Decision stops short of contending that SME holds market power, saying only that “*the CMA considers Sony to have a strong market position*” (para. 122). The Phase 1 Decision, at paras. 53 and 122, suggests that the market for digital music distribution is highly concentrated based on shares. But those shares show that SME trails Universal by a large margin. There is, rightly, no suggestion that the three “majors” are collectively dominant or tacitly coordinating.

⁶⁶ Case COMP/M.6458 *Universal Music Group/EMI Music*, paras. 372 and 662.

⁶⁷ See **Appendix 7**.



42. In short, SME holds a modest share; faces intense competition for artists (including from Universal, the undisputed market leader)⁶⁸; has had to accept [REDACTED] deal terms from DSPs and artists; and has no ability to act independently of competitive pressure. SME's lack of any degree of market power renders it even less likely that a potential competition theory of harm from the acquisition of AWAL could lead to an SLC.

C. AWAL's And SME's Different Focuses Would Not Change In The Counterfactual

43. There is no cogent evidence that shows that AWAL's and SME's different focuses would have materially changed, absent the Transaction.
44. **SME was not planning to expand The Orchard as a competitive response to AWAL.** The Phase 1 Decision claimed that SME considered AWAL in the context of developing its own A&L service through The Orchard (Phase 1 Decision, para. 128c). But changes to SME's terms had been several years in the making and reflected long term shifts in industry dynamics, not a response to AWAL (which, in fact, pre-existed The Orchard). The reality is that these changes respond to artists' demands, as the extract from SME's documents below makes clear:

⁶⁸ Case COMP M.6458 *Universal Music Group/EMI Music*, para.28.



45. Due to technological advances, artists have more options to go to market, they are able to record music themselves, establish their own following (e.g., by uploading music to social media or directly to DSPs), and track their performance. As a result, artists are demanding higher compensation and more control over their music.⁶⁹
46. The shift in overall industry dynamics is evident from:
- The fact that artist costs represent an ever-increasing share of SME's revenues, in line with SME's facing increasing competition for artists; and
 - SME's various initiatives to place its artists in an improved financial position,⁷⁰ including, by way of example, by waiving unrecouped balances,⁷¹ enabling artists to obtain advances on their projected royalties,⁷² and voluntarily disbursing \$250 million to eligible artists and partners from the sale of its stake in Spotify.⁷³

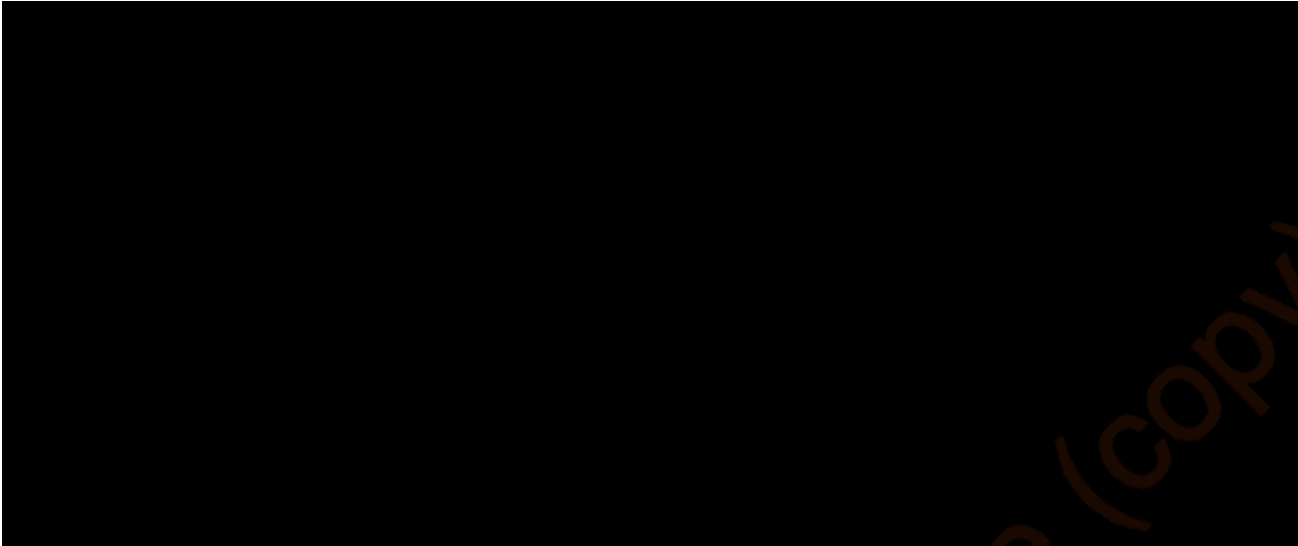
⁶⁹ See **Appendices 1 and 7**.

⁷⁰ See Annex3 of SME's Response to RFI 7, which includes press clippings on SME's initiatives.

⁷¹ See *In Historic Move, Sony Music Is Disregarding Unrecouped Balances For Heritage Catalog Artists*, Music Business Worldwide, 11 June 2021, available at: <https://www.musicbusinessworldwide.com/in-historic-move-sony-music-announces-its-disregarding-unrecouped-balances-for-heritage-catalog-artists/>.

⁷² *Ibid.*

⁷³ See *Check's in the Mail: Sony Music Disburses \$750 Million to Artists in 'Spotify Windfall'*, Variety, 17 August 2018, available at: <https://variety.com/2018/music/news/sony-music-spotify-windfall-artists-labels-get-750-million-1202905781/>.



47. [REDACTED]

48. [REDACTED]

49. **Absent the Transaction, hypothetical organic growth by The Orchard into artist services would have had limited competitive relevance.** The Orchard has a nascent artist services business, with only [REDACTED] artists in the UK (up from [REDACTED] in 2020). In the three years since its inception in 2018, The Orchard’s artist services business has gained a UK share of [REDACTED].⁷⁴ The Parties are not aware of any evidence to suggest the business was poised for rapid expansion. Even if, absent the Transaction, The Orchard had grown that artist services business organically at the same rate as AWAL over the last ten years (which the Phase 1 Decision considered fast-growing), it would achieve a share of [REDACTED] by 2028 (*i.e.*, AWAL’s current UK share excluding distribution). Accordingly, even in those circumstances – and taking the extreme assumption that other A&L services have no competitive response and do not expand themselves – The Orchard/AWAL’s combined share would [REDACTED].

50. The Orchard’s plans to expand its artist services offering are in the early stages of development. [REDACTED]

⁷⁴ Based on revenues from The Orchard’s UK artists and 2020 IFPI market data.



51. It is important, moreover, to recall the overall framework for assessing a potential competition theory. The fact that a merger party may have aspirational plans absent the merger to compete more closely does not imply an SLC. In *Cox / AutoTrader*, AutoTrader (the market leader) had well-developed plans to build its own B2B platform that would have directly competed with Cox.⁷⁵ In *PayPal / iZettle*, iZettle had plans to expand its online payments offering to compete directly with the leader, PayPal.⁷⁶ And in *Roche / Spark*, Spark was developing a new gene therapy treatment for Haemophilia A that was expected to compete with Roche's non-gene therapy treatment in the future.⁷⁷
52. In each of these cases, the CMA concluded that development plans of the merger parties were not sufficient to create an SLC. This is because, even assuming the plans were successful, the potential competition lost from the merger was not significant and significant competitive constraints remained.⁷⁸ The same considerations apply here. The Parties are not aware of any evidence that SME/The Orchard would be materially better placed than other parties to expand in A&L services. As discussed in Section VI below, regardless of new entry, there are already multiple players in the A&L services space, including players that offer services in multiple tiers, and these players have substantially larger numbers of artists than the [REDACTED] UK artists signed to The Orchard.
53. In addition, SME's financial resources and ability to invest in artist services are not unique. A&L service providers seeking to expand have been able to attract funding through IPOs as well as investments from digital platforms, such as Google and Apple, as well as private equity firms and the other global music companies. For example, Universal has entered A&L and DIY services acquiring INgrooves and Spinnup, re-branding Virgin (formerly Caroline), and partnering with PIAS, while Warner has established a presence in A&L and DIY services via ADA and Level. Believe (the owner of Tunecore) raised €300 million in its IPO this year (implying a \$2.3 billion valuation). Downtown sold copyrights worth \$400 million in April 2021 to fund the creation of Downtown Music Services, a new A&L services division. Apple and Google collectively

⁷⁵ *Cox Automotive / Auto Trader*, ME/6765/18, 21 November 2018 (CMA considered it likely that, absent the merger, AutoTrader would launch a platform for selling cars that would have competed directly with Cox's platform: "(i) AutoTrader would have relaunched Smart Buying, and (ii) AutoTrader's plans would have improved Smart Buying's services and led to it becoming a more direct competitor)" (para. 25).

⁷⁶ *PayPal / iZettle*, Final Report, 12 June 2019. In *PayPal / iZettle*, the CMA found that iZettle's intended expansion into omni-channel services to smaller merchants would not give rise to an SLC because there were several significant competitors and a high likelihood of future entry.

⁷⁷ *Roche / Spark*, ME/6831/19, CMA Phase 1 Decision 16 December 2019, para. 214.

⁷⁸ See, e.g., *Cox Automotive / Auto Trader*, ME/6765/18, 21 November 2018 ("Even allowing for AutoTrader's development of Smart Buying, the competitive constraint lost as a result of the JV is limited. Set against that, the JV will be constrained by several credible competitors, including BCA (the market leader in physical auctions, which has its own online offering); other remarketing providers, such as Autorola and ADESA; and other parties who operate proprietary platforms, such as Motability").

invested \$120m in United Masters in 2021 and 2017, respectively. And Blackstone invested \$385m in Entertainment One in 2021.

54. The effects of this investment and increased competition have yet to be fully felt as new services build and develop their brand, strategy, and artist base. These newly energised providers are planning to expand their services, with Universal announcing that it is “increasing its efforts to provide independent artists and entrepreneurs with the most powerful, global resources available”,⁷⁹ Warner announcing that they are “strengthening how [they] serve original artists entrepreneurs,”⁸⁰ and Believe planning to invest “€100 million each year in external growth transactions over the 2022 – 2025 period.”⁸¹

55. **Absent the Transaction, AWAL would have struggled** [REDACTED]
[REDACTED] The Statement explains that the CMA will assess whether AWAL would have expanded the range of activities it undertakes or changed its approach absent the Transaction (Statement, para. 39f). [REDACTED]

[REDACTED] That evidence, set out below, is inconsistent with the Phase 1 Decision’s contention that “there is not a realistic prospect of an alternative counterfactual in which AWAL and KNR would have [REDACTED]”⁸²

56. [REDACTED]
[REDACTED]”

- [REDACTED]”

- [REDACTED]

⁷⁹ Universal Music Group, Prospectus, dated 14 September 2021, available at: [https://assets.ctfassets.net/e66ejtqbaazg/749WjX7s3LOIN199OTjfal/1a3d1ac5fc3ff687b3dd4fe4f0cc2b60/Universal Music Group - Prospectus -14 September 2021.pdf](https://assets.ctfassets.net/e66ejtqbaazg/749WjX7s3LOIN199OTjfal/1a3d1ac5fc3ff687b3dd4fe4f0cc2b60/Universal_Music_Group_-_Prospectus_-_14_September_2021.pdf).

⁸⁰ Dan Rys, Billboard, 4 July 2021, [Cat Kreidich Named President of ADA Worldwide, Succeeding Elah Seton](#).

⁸¹ Believe, IPO Registration Document, 7 May 2021, available at: https://ipo.believe.com/wp-content/uploads/2021/05/Believe_Registration-document.pdf.

⁸² Phase 1 Decision, para. 48.

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

57.

[Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

83 AWAL Site Visit deck, 12 October 2021, slide 19.

[REDACTED]

[REDACTED]

58. In these circumstances, it is implausible that AWAL was “*well-placed to expand successfully*” (Phase 1 Decision, paragraph 144). [REDACTED]

[REDACTED]

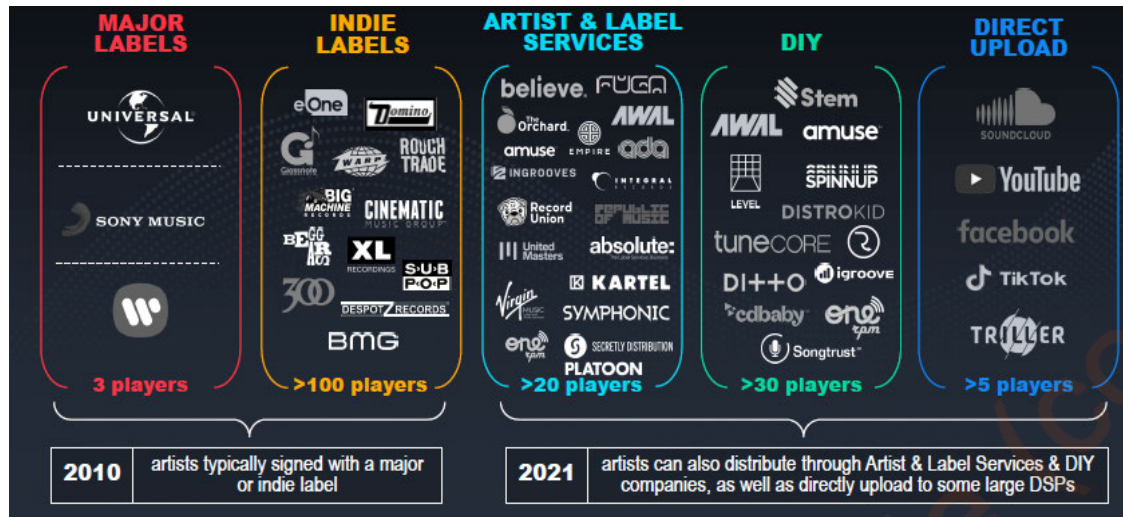
[REDACTED] which, as explained elsewhere, represents the counterfactual in this proceeding, is highly relevant any assessment of AWAL’s future competitive position.

V. Post-Transaction, The Parties Will Face Strong Competition From A Large Number Of Credible Rivals

59. The Statement explains that, in assessing the potential competition theory of harm, the CMA will assess the constraint from third parties, and will take into account “*entry or expansion by non-merging rivals over a similar time horizon as the merger firms’ entry or expansion*” (Statement, para. 41). This is an important step of the analysis. In several cases, the CMA has dismissed concerns about loss of potential competition even when one merger party had concrete plans to expand to compete more closely with the other, because of the constraint from rivals, who had their own expansion plans.⁸⁴

60. In this case, SME/The Orchard will face strong competition both in respect of its major frontline labels and in A&L and DIY services. As shown below, the competitive landscape is crowded, with dozens of different players competing. There is a clear trend towards new entry, as a result of which the landscape is set to become even more crowded:

⁸⁴ In *Cox / Autotrader*, ME/6765/18, CMA Phase 1 Decision 21 November 2018, para. 119-122, the CMA found that the merged entity would be constrained by a number of rivals in the future, including one which did not currently offer the same service as the merging parties but had invested money in expanding its offering. In *Amazon / Deliveroo*, CMA Final Report 4 August 2020, para 8.321, the CMA considered the expansion and service development plans of rivals in online convenience groceries, concluding that there was scope for significant growth in the market and that other participants were well-placed to compete with the merging parties. This contributed to the CMA’s finding of no SLC. In *Roche / Spark*, ME/6831/19, CMA Phase 1 Decision 16 December 2019, para. 214 and 218, the CMA examined the future competitive constraint imposed on the merging parties by pipeline products. Taken together with existing constraints, the CMA found that the merger did not give rise to a realistic prospect of an SLC. In *PayPal / iZettle*, ME/6766/18, CMA Final Report 12 June 2019, para 9.30 and 9.35, the CMA considered that there were significant competitors to the merging parties in the provision of omnichannel services to smaller merchants and several likely entrants or expanding rivals. As a result, it found that iZettle’s expansion into this market was unlikely to result in an SLC.




Slide 6, CMA presentation of 25 May 2021

61. **Universal and Warner are SME’s closest competitors.** SME’s strongest competitors are the other two global music companies, Universal, and Warner.⁸⁵ Universal, in particular, has a share of supply considerably higher than SME, and has been found by the EU Commission to be the “undisputed market leader by a large margin.”⁸⁶ Both Universal and Warner already offer the full suite of artist and DIY services and had acquired and developed those offerings long before SME.⁸⁷ SME constantly tracks and compares the performance of Universal and Warner, as its internal documents show:

⁸⁵ In addition, SME’s frontline labels face competition from numerous independent labels, such as BMG, Beggars Banquet Records, Domino, Ninja Tunes, and Glassnote Records. Frontline labels have always competed fiercely to sign new artists, acquire catalogue and attract established artists from other labels (subject to any outstanding contractual commitments to their existing labels), which can result in high profile examples of artists switching. Acquiring AWAL has no impact on competition among frontline labels. As explained above, AWAL does not compete with SME’s frontline labels for artists.

⁸⁶ Case COMP M.6458 *Universal Music Group/EMI Music*, paras. 372, 662.

⁸⁷ Midemreport, *Artist & Label Services: How Technology is Energising an Artists-First Global Business*, p. 9. Universal’s A&L service divisions include: (i) Spinnup (a DIY platform), acquired by Universal in 2013, which offers a subscription-funded service for artists to upload their recordings on global digital service providers, such as Spotify, Apple Music, YouTube/Google, and Amazon; and (ii) Virgin Music Label and Artist Services Overseas (formerly known as Caroline International), which works with more-established international artists like Van Morrison and Chrissie Hynde. Warner’s service divisions include (i) Level Music (a DIY platform), which was introduced in 2018 to work with unsigned acts; and (ii) ADA, which has focused on independent creators’ digital needs since 2012.



62. There are numerous similar examples. Electronic searches of c. 95,000 of SME's internal documents gathered in response to the CMA's s109 Notice show that Universal and Warner are mentioned c. [REDACTED] times and c. [REDACTED] times, respectively, whereas AWAL was mentioned only c. [REDACTED] times.⁸⁸

63. **AWAL is only one of many artist and DIY service providers.** Competition among artist and DIY service providers is vibrant, with dozens of competing players offering a largely commoditized set of products that can be easily replicated.⁸⁹ AWAL's internal documents describe this competition as "[REDACTED]".⁹⁰ The Parties are unaware of any intellectual property or know-how that would enable one provider to win a persistent competitive advantage over others. Artists therefore have a wide and ever-growing range of artist and DIY services providers to choose from. The different providers fall into four main groups:

- ***Services-focused providers*** sign up artists and distribute their recordings, typically offering an array of distribution, marketing, advertising, sync licensing, analytical, and rights management services. Examples include Absolute, ADA, Believe, Empire, Entertainment One (recently acquired by Blackstone for \$385 million⁹¹), FUGA, Idol, Integral (formerly PIAS), Platoon, Secretly Distribution, Stem Disintermedia, Virgin Music Label and Artist Services (formerly Caroline). Some also provide distribution services to independent labels. BMG, for example, which describes itself as the "fourth

⁸⁸ These documents responded to the search terms agreed between SME and the CMA in relation to the CMA's s109 notice of 22 September 2021, save that documents generated after 1 September 2020 have been excluded on the basis that they may include a disproportionate number of references to AWAL as a potential acquisition target. SME carried out a search over this universe of documents to illustrate the companies most frequently mentioned in SME's documents. These documents, subject to ongoing review for relevance and legal privilege, will be provided shortly.

⁸⁹ See too **Appendix 2**.

⁹⁰ See **Appendix 6**.

⁹¹ See Digital Music News, Blackstone Acquires Death Row Records Owner eOne Music In \$385 Million Deal, 27 April 2021, available at: <https://www.digitalmusicnews.com/2021/04/27/blackstone-eone-music-acquisition/>.

major” now offers a “*new-style artist services structure*” as an alternative to a “*traditional royalty-based deal*.”⁹²

- **DIY platforms** are low-cost options for artists to upload music and have it distributed widely. DIY platforms typically do not offer additional artist support services, although artists can and do use these platforms alongside their own teams of services providers (e.g., engaging a third party manager or concert promoter directly). Some DIY platforms operate an “ungated” model, meaning that any artist can join and upload their music without material quality control. Other platforms operate a “gated” model, meaning that they exercise some level of review before deciding which artists or tracks to accept. Examples of DIY platforms include CD Baby, DistroKid, Spinnup, Level, and TuneCore.
- **Mixed platforms** incorporate both DIY options as well as core artist services, possibly arranged as different tiers through which artists can progress. Examples include AWAL, Believe/TuneCore and Downtown/CD Baby. Developing a DIY platform can act as an entry point into the artist services area: Ditto and Amuse began as DIY platforms and later grew more fully-scoped artist services divisions by identifying and developing emerging talent within their DIY streams. The boundary between gated and ungated DIY models is fluid and new and emerging artists consider both options. The fact that both models compete is apparent from the inclusion of each type of operator in the Parties’ internal documents,⁹³ and switching between them.⁹⁴
- **DSP-turned-distributors.** Starting out as a DSP, SoundCloud went on to develop a distribution service and in 2019 acquired an artist services arm.⁹⁵ In April 2021, SoundCloud cemented its focus on artist services by hiring Eliah Seton as its new President – former President of Independent Music & Creator Services at Warner Music Group.⁹⁶

64. The Phase 1 Decision’s treatment of the competitive significance of these different models is inconsistent. Notwithstanding evidence that ungated DIY platforms have grown faster than AWAL, have a higher market share,⁹⁷ are cited as being competitors

⁹² See <https://www.bmg.com/uk/recording.html>.

⁹³

⁹⁴ AWAL Site Visit deck, 12 October 2021, slide 12.

⁹⁵ See Music Business Worldwide, ‘Why SoundCloud has the music business right where it wants it’, 19 April 2021, available at: <https://www.musicbusinessworldwide.com/michael-weissman-why-soundcloud-has-the-music-business-right-where-it-wants-it/>.

⁹⁶ See Music Business Worldwide, Official: Eliah Seton Named President of SoundCloud, 8 April 2021, available at: <https://www.musicbusinessworldwide.com/official-eliah-seton-named-president-of-soundcloud/>.

⁹⁷ See Issues Letter, paragraph 67 (“the evidence from Table 1 shows that AWAL is with the exception of ungated DIY distributors, the only licensor with a significant stream share that has experienced considerable growth” and only “outside the major labels [...] and ungated DIY platforms [does] AWAL possess the highest market share”).

in SME's and AWAL's internal documents⁹⁸ and by third parties,⁹⁹ the Phase 1 Decision found that ungated DIY platforms do not “*exert a significant competitive constraint on the Parties*” (Phase 1 Decision, paragraph 212) because “*these suppliers offer a different model to that of A&L service providers such as AWAL and The Orchard*” (Phase 1 Decision, paragraph 212).

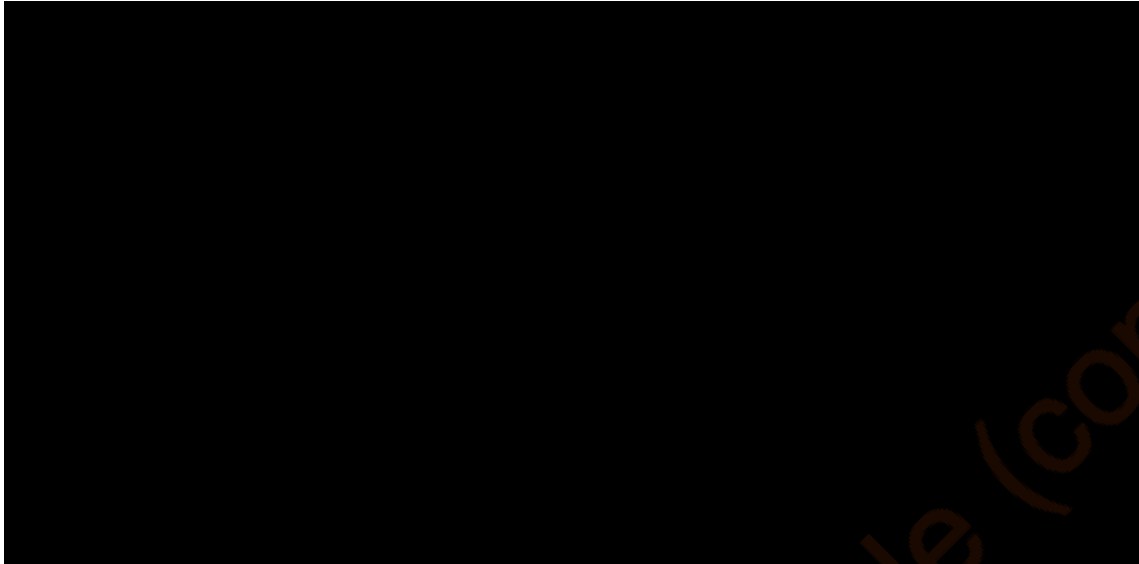
65. However, in respect of the constraint imposed by artist services providers on frontline labels, where the evidence is far weaker, the Phase 1 Decision found that AWAL is “*an important emerging supplier in the digital music distribution in the UK*” precisely because its “*multi-tier*” and “*gated*” model is different from the traditional label model (Phase 1 Decision, paragraphs 128 and 131). The critical question is whether any differences between business models affects competitive interaction, and, here, the evidence clearly shows that DIY services exert a far greater competitive constraint on AWAL than AWAL exerts on SME.¹⁰⁰
66. **AWAL is neither the largest nor the most successful A&L and DIY service provider.** Launched in 1997, AWAL was purchased by Kobalt in 2011, at which time it was already competing with providers such as OneRPM (launched 2010), Symphonic (2006), Ditto (2005) and Empire (2010). Its DIY distribution customers – at c. 14,000 – are dwarfed by those of DistroKid (2 million), CD Baby (1 million) or TuneCore (250,000).¹⁰¹ Its revenues are much smaller than those of Believe, for example, which generated c. \$700 million globally in 2019 and has about 1,300 employees globally. Even after AWAL's re-launch in 2017/18, it is still a small player and faces competition from a multitude of other A&L and DIY providers, including Believe, BMG, CD Baby, DistroKid, Ditto, PIAS, and Tunecore. Profiles of these companies are provided in **Annex 1**. There is no evidence that AWAL was set to surpass other A&L and DIY services providers in the counterfactual.
67. **Within A&L, multiple companies compete in each of artist and label services:** Focusing on the different categories of A&L services (for artists and labels, respectively), there are large numbers of different companies that cater to artists and labels. While AWAL and The Orchard do not compete with each other because of their different focuses, they each face multiple rivals. For example, AWAL's primary competitors in artist services and DIY include DistroKid, Amuse, Ditto, TuneCore, CDBaby, while The Orchard's primary competitors in label services include PIAS, INgrooves, Absolute. Companies such as ADA, Believe, Integral, and Virgin cater to both artists and labels (unlike either AWAL or The Orchard):

⁹⁸ See **Appendices 5 and 6**.

⁹⁹ The CMA's own survey evidence at Phase 1 identifies ungated DIY platforms as being within the top three competitors to AWAL according to both artists, who cited Distrokid, and labels, who cited TuneCore (see Issues Letter, paragraph 86).

¹⁰⁰ See, e.g., **Appendices 1, 2, 5, 6, and 7**.

¹⁰¹ DIY platforms alone were estimated to account for 3.9% of the global recorded music market in 2019 (see Music Business Worldwide, *DIY Artists Generated \$821m in 2019 – Now Amuse Is Launching a Pro Subscription Tier to 'Accelerate their Careers'*, 2 March 2020, available at: <https://www.musicbusinessworldwide.com/diy-artists-generated-821m-in-2019-and-amuse-is-launching-a-pro-subscription-tier-just-for-them/>.)



68. **A&L and DIY service providers are entering and expanding.** A&L and DIY services is a fast-growing sector with a range of players seeking to invest, including private equity firms, tech platforms, and major record labels.¹⁰² Players in this space are focusing on new initiatives to expand. For example, PIAS, an independent label, rebranded its A&L services division to Integral in April 2021 to mark a renewed focus on this business.¹⁰³ In June 2021, PIAS entered into a “*strategic global alliance*” with Universal giving the latter access to PIAS’s distribution network and services in return for funding and resources.¹⁰⁴ Like the expansion plans set out in Universal’s 2021 prospectus (*see* paragraph 54 above), this evidence refutes the Phase 1 Decision’s contentions that “*major record labels may...have limited incentive to compete aggressively in A&L services*”¹⁰⁵ and that “*PIAS exerts a limited competitive constraint on the Parties.*”¹⁰⁶ Several rival providers have won substantial investment to boost further growth and expansion:

- Believe raised €300 million in an IPO this year, against €441 million consolidated revenues in 2020.¹⁰⁷ This IPO may just be a step in Believe’s fund raising activities, with reports suggesting that Believe could raise an even higher sum (up to €2 billion) in the public market, for a total value of four times its 2017 valuation.¹⁰⁸

¹⁰² See Appendix 1.

¹⁰³ See Music Business Worldwide, ‘The Launch of [INTEGRAL] Shows Our Absolute Commitment to Independent Distribution Worldwide’, 1 April 2021, available at: <https://www.musicbusinessworldwide.com/kenny-gates-the-launch-of-integral-shows-our-absolute-commitment-to-independent-distribution-worldwide/>.

¹⁰⁴ See PIAS and Universal Music Group Announce Strategic Alliance, available at: <https://www.universalmusic.com/pias-and-universal-music-group-announce-strategic-alliance/>.

¹⁰⁵ Phase 1 Decision, para. 178.

¹⁰⁶ Phase 1 Decision, para. 205.

¹⁰⁷ <https://www.musicbusinessworldwide.com/tunecore-parent-believe-aims-to-raise-e500m-as-it-begins-ipo-process-in-france/>

¹⁰⁸ <https://www.musicbusinessworldwide.com/indie-distribution-giant-believe-looks-headed-for-a-2bn-plus-ipo-next-year/#:~:text=Earlier%20this%20year%2C%20MBW%20revealed.>

- United Masters has received substantial investment since it launched in 2017, first from Google, Andressen Horowitz, 20th Century Fox (\$70 million in 2017), and subsequently from Apple (\$50 million in 2021).¹⁰⁹ United Masters is currently valued at c. \$350 million.¹¹⁰
 - eOne sold its music business to the private equity firm The Blackstone Group for \$385 million in 2021.¹¹¹
 - CD Baby, which generated \$125 million in global revenues in 2020,¹¹² was acquired by Downtown Music Holdings in 2019 for c. \$200 million.¹¹³
 - Downtown, an independent label, sold copyrights worth \$400 million in April 2021 to fund the creation of Downtown Music Services, a new A&L services division.¹¹⁴
69. **Rivals have a broad geographic scope, which makes them stronger competitors.** Providers with a presence across multiple territories – such as ADA, Believe, Ditto, OneRPM, INgrooves, Virgin, BMG, and Integral – are strong competitors in the UK because their broader geographic scope makes them more attractive to artists. A local presence translates to local expertise and relationships to support marketing, promotion, radio plugging and other efforts, to help artists reach audiences in multiple territories. An artist based in the UK could launch a digital advertising campaign in Europe, the U.S., or emerging music markets. Artists also value being able to distribute music to local DSPs in multiple territories as well as the major global DSPs.
70. **Switching data show that The Orchard’s closest competitors are Believe, OneRPM, PIAS, INgrooves, ADA, and Fuga.** While there has been zero switching between The

¹⁰⁹ See, e.g., TechCrunch, Apple invests \$50M into music distributor UnitedMasters alongside a16z and Alphabet, 31 March 2020, available at: <https://techcrunch.com/2021/03/31/apple-invests-50m-into-music-distributor-unitedmasters-alongside-a16z-and-alphabet/> (“Independent music distribution platform and toolfactory UnitedMasters has raised a \$50 million series B round led by Apple. A16z and Alphabet are participating again in this raise. United Masters is also entering a strategic partnership with Apple alongside this investment”).

¹¹⁰ <https://www.bloomberg.com/news/articles/2021-03-31/apple-invests-in-music-startup-devoted-to-independent-artists>.

¹¹¹ See Digital Music News, Blackstone Acquires Death Row Records Owner eOne Music In \$385 Million Deal, 27 April 2021, available at: <https://www.digitalmusicnews.com/2021/04/27/blackstone-eone-music-acquisition/>.

¹¹² <https://www.musicbusinessworldwide.com/cd-baby-collected-125m-from-digital-platforms-like-spotify-apple-music-and-youtube-music-in-2020/>.

¹¹³ <https://variety.com/2019/music/news/downtown-acquires-cd-baby-owner-avl-in-200-million-deal-1203174103/>.

¹¹⁴ See <https://www.downtownmusicservices.com/> and Music Business Worldwide, After Selling Catalog to Concord, Downtown Launches New Services Division Led by Mike Smith, 26 April 2021, available at: <https://www.musicbusinessworldwide.com/after-selling-catalog-to-concord-downtown-launches-new-services-division-led-by-mike-smith/>. This launch followed Downtown’s multiple investments into the artist and label services segment in 2019-2020, when it acquired DIY platform CD Baby and digital distributor DashGo, along with five other distributors of digital recorded music or ancillary services.

Orchard and AWAL (as discussed above¹¹⁵), the switching data show that there is switching between The Orchard and other companies, including Believe, OneRPM, PIAS, INgrooves, ADA, and Fuga. Those companies, not AWAL, represent The Orchard's close competitors.



71. Switching occurs in both directions. Of the [REDACTED] instances of clients switching identified above, the breakdown was as follows:



72. These data confirm that SME/The Orchard will face strong competition from a large number of credible rivals that exert a significant constraint on the Parties and are capable of expanding their offerings in the future.

VI. The Parties' Documents Confirm That AWAL Is A Limited Competitor And The Parties Face Multiple Strong Rivals

73. Faced with real-world evidence on lack of competition, the Phase 1 Decision relied to a large extent on the Parties' internal documents to identify the risk of potential competition concerns. The Parties' documents, however, are fully consistent with the

¹¹⁵ See too **Appendix 3**.

¹¹⁶ On 21 October 2021, it was announced that The Orchard lost one of its most significant label clients, HYBE, to Universal/INGrooves ([see BTS To Leave Sony Music For Universal](#)).

lack of competition between the Parties and the existence of a large number of strong rivals. The discussion below is complemented by an analysis of SME's and AWAL's documents, attached at **Appendices 5 and 6**, respectively.

74. **AWAL is not mentioned more frequently or prominently than other competitors.** Citing only three SME documents in support, the Phase 1 Decision found that AWAL was mentioned “*most frequently and, typically, most prominently*” among rivals in SME's internal documents (Phase 1 Decision, para. 128).¹¹⁷ Two separate analyses, described in **Appendix 5**, show that that this claim is unfounded. In particular:

- A manual review of 42 SME strategy decks submitted to the CMA finds that, once account is taken of references to AWAL in documents generated at a time when AWAL was considered to be an acquisition target, AWAL is mentioned a total of [REDACTED]¹¹⁸
- An electronic search of the c. 95,000 SME internal documents that are currently being reviewed for responsiveness and legal privilege prior to being provided in response to the CMA's s109 Notice of 22 September 2021 shows that AWAL was mentioned [REDACTED]

[REDACTED]¹¹⁹

¹¹⁷ Phase 1 Decision, fn .165, in which the CMA concludes “*AWAL is listed right above One RPM and Empire in artist services. This does not reflect the alphabetical order of the companies. This is evidenced by the fact that the same page lists ADA and Amuse in label distribution and DIY services respectively towards the bottom of the lists, indicating that the ordering reflects which company Sony sees as the biggest threat*”.

¹¹⁸ In all cases, the analysis excludes references to competitors as potential or definitive acquisition targets (such as AWAL, CDBaby, and OneRPM) because these references are not representative of Sony's view of the competitive landscape.

¹¹⁹ The electronic search was conducted on the universe of documents that responded to the search terms agreed between SME and the CMA in relation to the CMA's s109 notice of 22 September 2021, save that documents after 1 September 2020 have been excluded on the basis that they may include a disproportionate number of references to AWAL as a potential acquisition target. SME carried out a search across these documents to identify the companies most frequently mentioned in SME's documents. These documents, subject to ongoing review for relevance and privilege, will be provided shortly.

¹¹⁹ See **Appendix 5**. SME recognizes that the number of references to Believe, IDOL, and Integral may be disproportionately high as these words are used in normal course parlance.

[REDACTED]

[REDACTED]

75. Even the three documents cited by the Phase 1 Decision do not support the claim that AWAL is a close competitor to SME.¹²⁰ The documents list dozens of different “*competitive threats*” and “*disruptors*”, across multiple categories including the “majors”, the label distribution competitors, the artist services competitors, and DIY services;¹²¹ they describe how SME faces “[REDACTED]”;¹²² and they

make clear that even drilling down only to artist services (where The Orchard is hardly present), there are several credible companies, [REDACTED].¹²³ It is difficult to conceive of documents that are further from “smoking gun” evidence of a competitive problem. These documents are not sufficiently probative to support the CMA’s theory of harm at the applicable Phase II standard of proof.¹²⁴

76. Moreover, the conclusions drawn from these three documents in the Phase 1 Decision are in any event internally inconsistent. They are cited as evidence of AWAL’s “important competitive presence within digital distribution” (Phase 1 Decision, paragraph 127), yet FUGA, which is also listed as one of many “disruptors” is said not to have been mentioned “as a competitor” in internal documents (Phase 1 Decision, paragraph 192), and determined to be a “limited competitive constraint on the Parties” (Phase 1 Decision, paragraph 197). In addition, numerous DIY services (e.g., Distrokid, CD Baby, Tunecore, OneRPM) are listed as “competitive threats” and “disruptors”, but are determined not to “exert a significant competitive constraint on the Parties” (Phase 1, Decision paragraph 192). These documents merely show that SME operates in a dynamic and highly competitive industry and has to work hard to stay relevant.
77. **SME’s documents reflect SME’s/The Orchard’s and AWAL’s complementary activities and capabilities.** SME’s documents confirm that the complementarity of SME/The Orchard and AWAL was fundamental to SME’s rationale for the transaction:

[REDACTED] ”125
[REDACTED] ”126

¹²⁰ Paragraph 128 of the Phase 1 Decision cites (i) Annex 19.5 – The Orchard FY2020 Review FY2021 Strategy, dated approximately within the past two years, response to s 109 Notice of 21 April 2021, slide 43; (ii) Annex 19.6 – SME Nov 2019 Mid-Range Strategy Review, 6 November 2019, response to s 109 Notice of 21 April 2021, slide 10; and (iii) Annex 19.3 – The Orchard FY2019 Review FY2020 Strategy, dated approximately within the past two years, response to s 109 Notice of 21 April 2021, slide 32.

¹²¹ [REDACTED]

¹²² Annex 19.5, response to s 109 Notice of 21 April 2021, slide 43.
¹²³ Annex 19.3, response to s 109 Notice of 21 April 2021, slide 32.
¹²⁴ Merger Assessment Guidelines, para. 2.31.
¹²⁵ Annex 1.1.15-A – Approval Application (Courtesy Translation), 29 January 2021, response to s 109 Notice of 4 June 2021, page 2.
¹²⁶ Annex 7.1.1 – PROJECT OVERDRIVE – GEC appv2, January 2021, response to s 109 Notice of 16 September 2021, slide 5.



78.



¹²⁷ Annex1.1.17 – Global Management Meeting Presentation, 11 February 2021, response to s109 Notice of 4 June 2021, slide 17.

¹²⁸ Annex9.3 – GEC 2021.1.21_Agenda_E, 21 January 2021, response to s109 Notice of 16 September 2021, page 2.

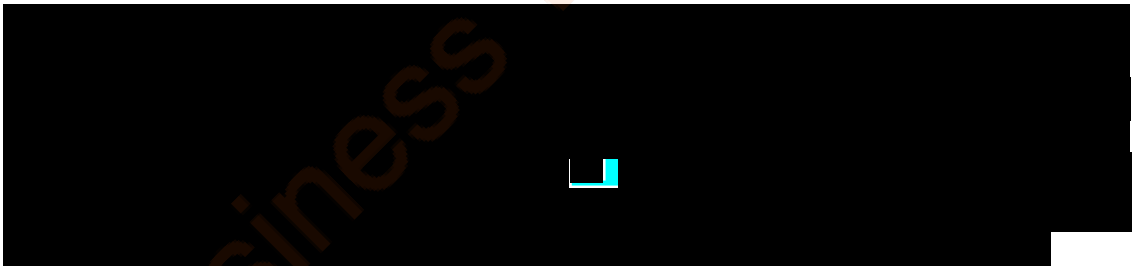
¹²⁹ Annex21.14-A – PJ Overdrive (Courtesy Translation), dated within the past two years, response to s109 Notice of 21 April 2021, slide 4.



79. **SME's documents do not identify anything special about AWAL as an actual or potential competitive threat or disruptor.** SME's documents describing the competitive landscape consistently identify numerous (for example, [REDACTED]) competing players. AWAL is not singled out or otherwise emphasised (other than in documents relating to the Transaction).



80.



¹³⁰ Annex9.3, response to s109 Notice of 16 September 2021, page 2.

¹³¹ Annex2.1.7 – Board Workshop – Dec 2020, 8 December 2020, response to s109 Notice of 4 June, slide 15.

¹³² Annex2.1.8 - SME Business Operation Meeting, January 2021, Sony's response to the Section 109 Notice of 4 June 2021, slide 11.



81. **The references to AWAL's growth in SME's documents depend on SME's support and investment, not growth in the counterfactual.** AWAL's potential to grow is contingent upon the Transaction going ahead, in particular, SME's / The Orchard's global footprint



135

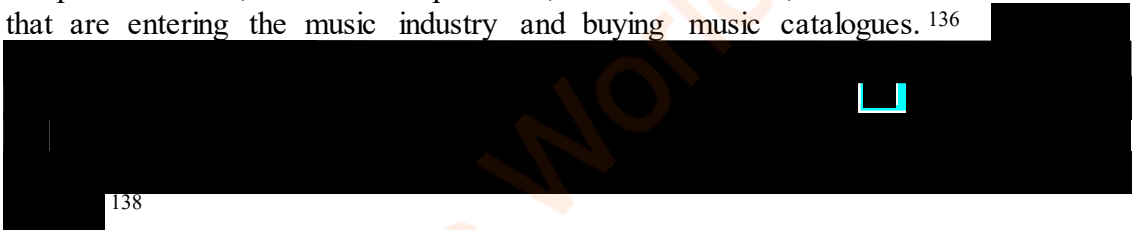
¹³³ Annex7.2 – Second Thread, 4-16 January 2021, response to s 109 Notice of 16 September 2021, page 2.

¹³⁴ Annex2.1.11 – Pre MRP-Budget Meeting – Feb 2021, 24 February 2021, response to s 109 Notice of 16 September 2021, slide 51.





82. **SME’s documents confirm numerous choices for artists.** SME’s documents confirm the wide range of services available to artists, including major global record companies, independent labels, A&L service providers, and DIY services, as well financial investors that are entering the music industry and buying music catalogues.¹³⁶



83. **AWAL’s documents confirm intense competition for artists.** AWAL’s documents confirm that AWAL operates in a highly competitive market, with competition from independent labels and artist services providers described as [REDACTED]”.¹³⁹ The documents show that AWAL is subject to significant pressure for artists from a large number and variety of competitors, including [REDACTED]. The Orchard features in AWAL’s documents principally as a competitor for label clients during the period before AWAL de-prioritised its labels business and began to focus on artists.

¹³⁶ Annex 19.7 – SME Mar 2020 MRP & Budget, 16 March 2020, response to s 109 Notice of 21 April 2021, slide 6. On 19 October 2021, it was announced that KKR had acquired music catalogue from Kobalt for \$1.1 billion. KKR explains that “*this transaction positions us with significant scale, which we will continue to grow by providing flexible, creative capital to music rights owners*” (see <https://variety.com/2021/music/news/kobalt-sells-fund-ii-with-songs-by-the-weeknd-lorde-and-more-to-kr-venture-for-1-1-billion-1235092441/>). This transaction makes KKR the largest independent holder of music rights.

¹³⁷ Annex 19.4 – SME Mar 2019 FY2020 Budget, 13 March 2019, response to s 109 Notice of 21 April 2021, slide 24.

¹³⁸ Annex 23.1 – Preliminary Non-Binding IOI October 2020, 26 October 2020, response to s 109 Notice of 21 April 2021, page 11.

¹³⁹ See Appendix 6.

84. **Documents confirm that SME has not developed its competitive strategy in response to AWAL.** Rather it has amended its strategy in line with artist demands and changing industry dynamics in order to remain competitive. For example, digitalisation has given rise to a greater number of artist and more options for artists than ever before: SME has been [REDACTED] from the artist community.¹⁴⁰ As explained in the testimony at **Appendix 7**, contrary to a suggestion made in the Phase 1 Decision, the evolution in the terms on which SME contracts with artists has been a response to artists and broader changes in the landscape, and not to AWAL.

VII. The Transaction Will Benefit Artists

85. The Statement indicates that the CMA is considering whether the Transaction may harm artists by reducing choice, lowering advances, narrowing the range of services available, and lessening innovation (Statement, para. 35). SME’s contemporaneous documents and track-record show that the Transaction will in fact benefit AWAL’s artists.

86. **SME plans to expand AWAL’s offering for artists.** SME’s announcement of the Transaction in February 2021, long before the CMA opened its investigation, revealed SME’s plan for AWAL to remain a “*Stand-Alone Artist Services Offering*” that “*will continue to sign, develop and market its own artist.*” SME’s “*investment to grow AWAL’s service offerings will create more opportunities for artists to reach fans globally, enabling more paths to market for artists*” and “*more exciting choices to connect with their audience worldwide.*”¹⁴¹

87. **SME’s financial model envisages substantial investment in artists.** The financial projections underlying SME’s valuation of AWAL reveal SME’s commitment to growing AWAL. [REDACTED]

[REDACTED] SME also plans to provide AWAL artists with a broader range of services [REDACTED]

[REDACTED] and expand AWAL geographically, which will expose AWAL artists to a wider audience. [REDACTED]

88. **SME plans to expand AWAL’s services and geographic footprint.** SME plans to expand the services available to AWAL artists by porting them to The Orchard’s technology. Additional services include tools to help artists with digital advertising,

¹⁴⁰ Annex 19.9 – SME Nov 2020 MRP, 12 November 2020, response to s109 Notice of 21 April 2021, slide 13.

¹⁴¹ SME to acquire leading artist services company AWAL, available at: <https://www.sec.gov/Archives/edgar/data/313838/000115752321000116/a52370842.htm>

royalty collection, YouTube optimisation, and merchandising. In addition, as the synergies and growth projections underlying SME's valuation model show, SME plans to expand AWAL globally. AWAL is currently active [REDACTED], whereas The Orchard is active in [REDACTED]. This expansion will increase AWAL artists' following and prospects in important growth markets (including in South America and Asia).

89. **SME has an impressive track record in supporting artists and the independent community.** SME has led the way in providing artist-friendly terms, introducing various initiatives to place artists and independent labels in an improved financial position. SME voluntarily disbursed [REDACTED] to eligible artists and label partners from the sale of its stake in Spotify. SME's decisions to waive artists' unrecouped balances and enable artists to obtain advances on their projected royalties have been described as "historic" and "landmark", with "many in the music industry never [thinking] we'd see a day where a major record company openly embraced such a plan."¹⁴²
90. SME's investment in and expansion of The Orchard provides a useful indicator of SME's plans for AWAL and its commitment to the independent sector. Since SME acquired full control of The Orchard in 2015, The Orchard has increased full time employees from [REDACTED] and expanded from [REDACTED] offices around the world. It has increased service capabilities and invested and developed its technology. The Orchard now serves over [REDACTED] independent labels (up from [REDACTED] in 2015) and has increased client advances over that period from [REDACTED].
91. [REDACTED], explains that "Since being acquired by SME, The Orchard has gone from strength to strength." She believes that "SME's support and investment enabled The Orchard to flourish." [REDACTED]
- 144
92. In short, SME's ownership of The Orchard provides strong evidence that the Transaction will benefit AWAL artists, increasing the choices, advances, services, and opportunities available to them.

¹⁴² See [In Historic Move SME Announces its Disregarding Unrecouped Balances for Heritage Catalog Artists](#), Music Business Worldwide, 11 June 2021.

¹⁴³ See **Appendix 11** ("In the five years before 2015, The Orchard paid c. \$[REDACTED] in advances to its label clients. In the five years after, The Orchard paid c. \$[REDACTED] in advances and other forms of recoupable funding. This money went directly to independent artists and labels to fund their creation, marketing, and promotion of their music. And in some cases, the cash flow helped labels stay in business").

¹⁴⁴ *Ibid.*

VIII. The Transaction Will Not Affect DSPs

93. The Statement suggests that the loss of future competition between the Parties in the wholesale distribution of recorded music could increase fees or reduce quality or innovation in the provision of music to DSPs (Statement, paragraph 36). The theory of harm seems to be that the combination of SME's and AWAL's catalogues may give the merged entity greater bargaining power vis-à-vis DSPs that allows it to negotiate supply terms that are less favourable to DSPs. This theory is not supported by the facts.
94. The DSPs – tech titans like Spotify, Apple, Amazon and Google – are unavoidable trading partners that exercise considerable bargaining power. SME's terms have for several years deteriorated in their favour. [REDACTED]
95. DSPs also often used to provide SME with ways of identifying what music consumers were listening to and how they engaged. [REDACTED]
96. [REDACTED] It is therefore implausible that SME's acquisition of AWAL, and the additional [REDACTED] increment in its global share that it would thereby obtain, could have any material effect on negotiations with DSPs.

IX. Conclusion

97. The relevant questions to ask in considering whether a transaction may substantially lessen future competition include the following:¹⁴⁵
- Do the merging parties compete with each other today and, if not, is there compelling evidence that they would compete closely with each other in the future?
 - Does the target have the well-developed and credible capability to expand and grow, absent the investment from the transaction?

¹⁴⁵ Merger Assessment Guidelines, paras. 5.7, 5.9-5.10, 5.15, 5.16, and Issues Statement, paras.39-41.

- Does the target have any significance that elevates its competitive position (e.g., a disruptive business model, pricing structure, or service offering)?
 - Will the merged entity face no or only limited competitive constraints from rivals?
98. On each of these questions, the clear answer is “no”. The Parties do not compete to any material extent, and would not have competed more closely absent the Transaction. The Parties face competition from dozens of credible and well-capitalized rivals, including Universal and Warner, which both offer the full suite of A&L and DIY services. AWAL is one of a large number of existing artist and DIY services providers and needed investment in order to maintain, let alone grow, its position. In the counterfactual – continued ownership by Kobalt – AWAL would have struggled to maintain its position and had no realistic prospect of becoming a more significant competitor in the foreseeable future.